avail himself thereof at any rate in the following cases:—

(a) where all the facts which the prosecution have set out to prove would not constitute a criminal offence even if they were accepted, or

(b) where an essential link in the prosecution case is provided by one or more witnesses whom the Magistrate has heard and whose evidence he is not prepared to accept.

In either of these cases it is obvious that to hear further evidence would be a mere waste of time.

In the present case it is clear that the deception which the prosecution relied on was a false statement made by the accused to the complainant as a result of which the complainant parted with $10.00. The prosecution were prepared to prove by a witness Haji Hassan that this statement had been made, and that the money was paid, and by another witness that the statement was untrue.

It was not competent for the learned Magistrate to decide finally as to the credibility of the complainant until he had heard Haji Hassan who might have supported him. Equally it was not competent to reject the evidence of a witness who had not been called. The fact, as found by the learned Magistrate, that the complainant and accused were almost in the position of partners, does not preclude the possibility of the accused having cheated the complainant. This was not therefore a case in which the learned Magistrate could avail himself of his powers under section 182 (g) after hearing the complainant only.

The appeal must accordingly be allowed and a retrial ordered before another Magistrate.

Retrial ordered.

[CRIMINAL REVISIONAL JURISDICTION]

AITKEN, J.

August 30, 1940.

REX v. ABU KASSIM BIN BABU.

[PENANG CRIMINAL REVISION No. 21 of 1940]

Criminal Procedure Code—S. 253 Part A of Table following—Compounding offence.

The offences set out in Part A of the Table following S. 253 of the Criminal Procedure Code can only be compounded with the consent of the Court. Such consent is not a mere formality and the Court has a discretion to grant or withhold such consent. The Magistrate may as a condition precedent to the giving of such consent require the accused to give an apology in open Court to the complainant. He cannot however impose upon the accused a condition that the accused must enter into a bond to keep the peace and to be of good behaviour for a specified period.

CRIMINAL REVISION.

Lim Kheng Kooi for the accused.

T. D. Hughes (Crown Counsel) for the Crown.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Aitken, J.—It is not usual for a Judge to deliver a written judgment when exercising the High Court's power of revision in regard to a Police Court case, but in this particular case, owing to its unusual circumstances and the questions of law which arose for my decision, I gave permission to both parties to appear and be heard by advocates, if they so desired. Both have availed themselves of that permission, and after hearing the arguments of learned counsel I reserved judgment.

It has not been an altogether easy matter for me to ascertain what actually did take place in the Court of the learned Magistrate concerned, when the accused appeared before him in the forenoon of the 9th of July, 1940, on a charge of having intentionally insulted the Imam of the mosque at Jelutong with intent to provoke a breach of the peace *contra* to the provisions of section 504 of the Penal Code. The learned Magistrate is in no way to blame for not having made a fuller note of the proceedings, because he was informed, as soon as the case was called, that the parties had arrived at a composition and only desired his consent thereto. In such circumstances the learned Magistrate had no reason whatever to suppose that the case would cause him or anyone else any further trouble, and consequently only made a short note of the subsequent proceedings which he has since expanded by a supplemental memorandum and certain information for which I asked him. From these materials I think I can reconstruct, so to speak, the proceedings in this matter which took place on the date in question.

On a previous date—the 25th of June 1940 to be precise—the accused had been charged before the learned Magistrate with having intentionally insulted one Haji Mohamed, who is the Imam of the mosque at Jelutong, with intent to provoke a breach of the peace, *contra* to section 504 of the Penal Code, and had claimed trial. The case was then, and on one other subsequent occasion, adjourned for further investigation, the accused being granted bail. When it was called on the 9th of July, 1940, it must be presumed that the police had completed their investigations and that the case was ready for trial.

As soon as the case was called the Court usher informed the learned Magistrate that the parties had

arrived at a composition to which they sought his approval. Thereupon, to quote his own words, the learned Magistrate "apprised himself of the terms of the composition, and in doing so learnt the substance of the case and elicited from the accused an admission of the facts."

At this stage it would seem that the Police Officer, who had attended to conduct the prosecution, informed the Court that he had been instructed by Crown Counsel to oppose the composition. Whether or no this announcement came as a surprise to the learned Magistrate I cannot say, but he continued to deal with the case on a composition basis, if I may be allowed to use such a phrase. He next asked the accused whether he was willing to apologise to the Imam in open Court, and on the accused intimating that he was so willing, the learned Magistrate directed him to do and the accused complied.

The terms of that apology did not strike the learned Magistrate as being sufficient, in themselves, to earn his approval of the composition and so, to quote once again his own words, he stated that if the accused would, in addition thereto, submit himself to be bound over in the sum of $50.00 to keep the peace for a period of six months, he would approve and allow the prosecution to be compounded.

At this point in the proceedings, and apparently whilst the Court Interpreter was asking the accused whether he was willing to be so bound, it suddenly occurred to the learned Magistrate that he probably had no power to bind the accused over, in view of the latter's plea claiming trial. He at once expressed his doubt in that respect to the prosecuting Police Officer, and adjourned the case to the afternoon of that same 9th of July so that he could look up the relevant provisions of the law in the meantime.

In the afternoon Mr. Lim Kheng Kooi appeared for the accused, and after the learned Magistrate had intimated to him that he, the learned Magistrate, was not prepared to approve the composition unless the accused pleaded guilty to the charge and submitted to be bound over to keep the peace, the case was adjourned, at Mr. Lim Kheng Kooi's request, to the forenoon of the next day, that is, the 10th of July 1940.

On the next day Mr. Lim Kheng Kooi, on behalf of the accused, sought to persuade the learned Magistrate to accept the accused's apology as a sufficient amende and waive his further condition as to the binding over. This the learned Magistrate refused to do, and as the accused refused to plead guilty and submit to being bound over, the efforts to obtain the learned Magistrate's approval of the composition came to an end. Moreover, since the learned Magistrate deemed himself to be prejudiced in the matter by what he had already heard, he sought to transfer the case to the Court of the Second Magistrate at Penang.

Unfortunately the Second Magistrate also deemed himself too prejudiced to hear this case, and he attempted to hand it over, but without success, to the First Magistrate. All the three Magistrates in this city found themselves too prejudiced to try this case, and it was eventually arranged for it to be tried at Butterworth by the Police Magistrate there. These attempted transfers, arrangements and rearrangements must have caused an appreciable degree of hardship, annoyance and expense to the parties concerned, and the order transferring the case to Butterworth cannot fail to add to those burdens if it is carried into effect.

My attention was drawn to the matter by a petition which appeared to emanate either from the complainant himself or a member of his family. I have since been informed by learned Crown Counsel and Mr. Lim Kheng Kooi that both the complainant and the accused disclaim all knowledge of this petition, but on that point the view I take is this:—that it is my duty to examine the record of any proceedings in an inferior criminal court which have come to my knowledge and, if necessary, exercise my revisionary powers in reference thereto. I do not know who sent me the petition for revision in this particular case, but it seems to me that anyone might properly have drawn my attention to this matter, and it cannot be contended that the proceedings now before me do not require careful consideration and investigation on my part.

I have come to the conclusion that the proceedings which took place in this case before the learned Magistrate on the 9th of July, 1940, have raised two points of law for my decision. Both of them are difficult to state at all concisely, but I will do my best to avoid unnecessary prolixity.

In order to make myself clear it appears to be necessary to set out the relevant provisions of section 253 of the Criminal Procedure Code. They are as follows:—

> "253 (1) The offences punishable under the sections of the Penal Code described in the first two columns of Part A of the Table next following may be compounded by the person mentioned in the third column of that Table or, when a prosecution for such offence is actually pending, be compounded by such person with the consent of the Court before which the case is pending.

(2) The offences punishable under the sections of the Penal Code described in Part B of the Table next following may, with the consent of the Court before which the case is pending, be compounded by the person to whom the hurt has been caused.

(5) The composition of an offence under this section shall have the effect of an acquittal of the accused.

(6) No offence under the Penal Code not mentioned in this section shall be compounded."

Amongst the offences described in the first two columns of Part A of the Table annexed to this section 253 is "insult intended to provoke a breach of the peace" *contra* section 504 of the Penal Code, and the person by whom the offence may be compounded is "the person insulted." Thus, if the words of section 253 (1) of the Criminal Procedure Code are interpreted in accordance with their grammatical and ordinary sense, the "person insulted" may compound an offence against section 504 of the Penal Code without anyone else's consent so long as no prosecution for that offence has been launched, and even after a prosecution has been launched he may compound the offence, but only with the consent of the Court before which the case is pending.

Mr. Lim Kheng Kooi, founding himself on a note at page 264 of the second edition of *Mallal's* Annotated Criminal Procedure Code etc., asked me to read into this subsection a provision that the Court's consent is a pure formality, which must be given if the "person insulted" expresses a desire to compound an offence mentioned in Part A of the Table annexed to the whole section.

Certainly the learned author of the second edition of *Mallal's* Annotated Criminal Procedure Code appears to have expressed himself to that effect, for at page 264 thereof he remarks:—"Under subsection (1) (of section 253), as soon as the parties have arrived at a compromise, the Magistrate has nothing more to do than to record a judgment of acquittal....." He quotes no authority in support of this proposition, which obviously does considerable violence to the language used by the Legislature, and deprives the words "with the consent of the Court before which the case is pending" of all practical effect.

Mr. Lim Kheng Kooi was also unable to quote me any authority in support of the learned author's construction of section 253 (1) of the Criminal Procedure Code, but he drew my attention to the fact that the "Tabular Statement of Offences under the Penal Code", which is to be found at the end of the Criminal Procedure Code, describes the offences to which section 253 (1) of the latter code refers as "compoundable", whereas it describes the offences to which section 253 (2) refers as "compoundable when permission is given by the Court."

Quite apart from the fact that this Tabular Statement is nothing more than a brief abstract or summary, which omits many details, I do not see why it should be allowed to control the clear and unambiguous provisions to be found in the body of the code. According to *Webster's* New International Dictionary the primary meaning of the word "consent" is "voluntary accordance with, or concurrence in, what is done or proposed by another". I accept that as correct, and I am also of opinion that it is my duty to construe section 253 (1) of the Criminal Procedure Code in accordance with the ordinary and grammatical meaning of the words employed. It follows, then, that the words "with the consent of the Court before which the case is pending" must be construed as conferring on the judicial officer constituting the Court a discretion to grant or withhold his consent because, if there was no such discretion, the voluntary act of the mind which is necessary to constitute a true consent would be entirely absent.

This brings me to the second point of law which I have to decide because, although I am clearly of opinion that the learned Magistrate had a discretion to grant or withold his consent to the composition at which the complainant and accused had arrived, that discretion is a judicial discretion and therefore one which must be exercised not only in accordance with the rules of reason and justice but also in accordance with the provisions of the law.

Now in this particular case the learned Magistrate appears to have laid down two conditions precedent, so to speak, to the giving of his consent to the proposed composition—(a) an apology in open Court by the accused to the complainant, and (b) an entry by the accused into a bond to keep the peace and be of good behaviour for a period of six months. The first of these two conditions appears to me to be eminently just and reasonable, but the second one could only be complied with if the accused withdrew his claim to be tried and pleaded guilty. Such a course of procedure, apart from certain other objections which could be urged against it, is in direct opposition to subsection (5) of this section 253 of the Criminal Procedure Code which provides that "The composition of an offence under this section shall have the effect of an acquittal of the accused." It could not very well have that effect if the accused had already pleaded guilty.

In the result I have arrived at the conclusion that the record of the proceedings which took place in this

case before the learned Magistrate on the 9th of July, 1940, disclose an error in law in that the learned Magistrate sought to impose an unlawful requirement on the accused as a condition precedent to giving his consent to a composition of the alleged offence. In view of the proceedings in this case subsequent to those of the 9th of July and certain attempts which have been made to influence me by bringing quite irrelevant matters to my notice, I have had no easy task in deciding on the proper order to be made in the exercise of my revisionary powers. Upon one point at any rate it would seem that everyone is agreed, and that is that the learned Magistrate was fully justified in requiring the accused to apologise to the complainant in open Court as a condition precedent to giving his consent to a composition.

I am therefore setting aside the order of transfer, and remitting this case to the learned Magistrate with a direction that he give the accused another chance of making a complete and satisfactory apology to the complainant in his Court. Should the accused then offer what any reasonable man would describe as an adequate and satisfactory apology, the learned Magistrate should, in my opinion, consent to the composition because the one lawful condition precedent which he imposed will have been performed. Should no such complete and satisfactory apology be forthcoming, then there appears to be no way out but another order of transfer.

Whatever may be the eventual outcome I do venture to express a hope that the heat which this case appears to have engendered in certain quarters not often affected in that way will soon be dissipated.

Order of transfer set aside.

[APPELLATE ORIGINAL JURISDICTION]

TERRELL, Ag. C.J.

July 16, 1940.

SENG SAI KEE v. REX.

[SINGAPORE MAGISTRATE'S APPEAL No. 57 of 1940]

Criminal Procedure Code—S. 173—An instance of improper charges.

An accused was charged with putting one Tan Kim Teck in fear of injury and also with committing theft of 12 lemonade bottles.

Held, that the two offences charged were not of the same kind and not connected in any way and the conviction was quashed.

APPEAL.

Appellant in person.

C. H. Koh (Ag. D.P.P.) for the Crown.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell, Ag. C.J.—The appellant was charged

(1) with putting one Tan Kim Teck in fear of injury on the 25th May 1940, an offence punishable under section 385 of the Penal Code, and

(2) with committing theft of 12 lemonade bottles on the same day on certain premises owned by one Abdul Razak.

Under section 173 of the Criminal Procedure Code every charge shall be tried separately except in the cases mentioned in sections 174, 175, 176 and 179. The two offences charged were not of the same kind and were not connected in any way, and the trial of the two offences simultaneously constitutes an illegality which cannot be cured.

Crown Counsel was unable to support the convictions and the appeal was accordingly allowed and the appellant discharged. There appeared to be no ground for interfering with the convictions or the sentences on the merits, and it is unfortunate that, owing to a disregard of provisions of the Criminal Procedure Code with which all Magistrates should be familiar, a dangerous criminal has got off.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

PEDLOW, J.

August 27, 1940.

VELLAMA v. ENG & CO. & ANOTHER.

[SINGAPORE SUIT No. 154 of 1940]

Collision between motor vehicles—Res ipsa loquitur.

When an accident takes place between two motor vehicles upon the road and the accident is such as in the ordinary course of things does not happen if those who had the management of the vehicles had taken proper care and when the motor vehicles are shown to be under the management of the defendants or their servants, the fact of the accident itself affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care. **Liffen v. Watson**[5] and **Halliwell v. Venables**[2] followed.

The plaintiff was a passenger in a motor bus which collided with a lorry. The plaintiff's arm was not inside the bus at the time and it appears that probably her arm was grasping or wrapped round one of the supports of the roof of the bus.

Held, that this did not amount to contributory negligence; and

Also held further, that the decisive cause of the accident was the driving of the two vehicles too close together as they passed each other and therefore even